Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

DANIEL P. ROBINOWITZ,
Petitioner,

VS.

RESOLUTION TRUST CORPORATION, as Receiver for Gibraltar Savings, FGMC INVESTMENT CORPORATION, and SHAWMUT FIRST MORTGAGE CORPORATION,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION 1 -- CONFLICT AMONG THE CIRCUITS.

Did the Court of Appeals improperly apply D'Oench, Duhme and 28 U.S.C. § 1823(e) to deny Robinowitz's "free-standing" tort claims for fraud and breach of fiduciary duty?

QUESTION 2 -- DEPARTURE FROM ACCEPTED AND USUAL COURSE; UNSETTLED RULE OF FEDERAL LAW

Did the Court of Appeals improperly extend the protection of D'Oench, Duhme and 28 U.S.C. § 1823(e) to a failed institution's subsidiary which had been sold two years prior to the failure?

QUESTION 3 -- DEPARTURE FROM ACCEPTED AND USUAL COURSE

Did the Court of Appeals improperly refuse to apply its own non-banking exception to D'Oench, Duhme and 28 U.S.C. § 1823(e) in this case?

QUESTION 4 -- DEPARTURE FROM ACCEPTED AND USUAL COURSE; UNSETTLED RULE OF FEDERAL LAW

Did the Court of Appeals improperly apply D'Oench, Duhme and 28 U.S.C. § 1823(e) since the books and records of the failed institution fully disclosed Robinowitz's claims at the time of the failure?

PARTIES TO THE PROCEEDING

1. Daniel P. Robinowitz.

2. Resolution Trust Corporation, as Receiver for Gibraltar Savings.

3. FGMC Investment Corporation.

4. Shawmut First Mortgage Corporation.

5. Tom Thomas of the law firm of Thomas, Sheehan & Culp, L.L.P. in Dallas, Texas.

6. Beth Ann Blackwood of the Law Offices of Beth Ann Blackwood in Dallas, Texas.

7. Peter Lovato and Lori Bellows of the law firm of Hopkins & Sutter in Dallas, Texas.

8. Bettina Lawton Alexander of the law firm of Dechert Price & Rhoads in Washington, D.C.

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OPINIONS DELIVERED IN THE CASE

This petition seeks to review the June 28, 1994 decision of the Court of Appeals for the Fifth Circuit affirming a judgment of the District Court for the Northern District of Texas, Dallas Division.[1]

STATEMENT OF JURISDICTION

Robinowitz seeks a review of the opinion of the Court of Appeals for the Fifth Circuit dated June 28, 1994.

The Fifth Circuit treated Robinowitz's Suggestion for Rehearing En Banc as a Petition for Panel Rehearing

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[1] The Fifth Circuit opinion is reported at 23 F.3d 951 (5th Cir. [Tex.]) (June 28, 1994) and is included in the Appendix as Exhibit A. The judgment of the District Court which was affirmed by the Fifth Circuit is included in the Appendix as Exhibit B.

and denied it on September 19, 1994.[2] The Suggestion for Rehearing En Banc was also denied at the same time.

This Court has jurisdiction to consider this Petition under 24 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

The only federal statute involved in this case is 12 U.S.C. § 1823(e) which reads as follows:

> **(e) Agreements against interests of Corporation**
>
> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured

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[2] A copy of the Court of Appeals' September 19, 1994 Order is included in the Appendix as Exhibit C.

depository institution, shall be valid against the Corporation unless such agreement --

(1) is in writing,

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

STATEMENT OF THE CASE

The Proceedings Below

Robinowitz originally sued his former partners and their parent corporations in state court in 1987

alleging that they breached fiduciary duties by fraudulently inducing him to sell them his interests in two real estate development partnerships in which three of them were the sole partners (R., V. 1: 30).[3]

The state court granted summary judgment for the Defendants, Robinowitz appealed, and the Texas appellate court remanded finding that Robinowitz had presented prima facie tort claims (R., V. 1: 81, 84, 102).[4] Shortly thereafter,

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[3] This is not a collection case brought by the RTC. There are not now, nor have there ever been, any issues in this case involving the collection or payment of promissory notes. Robinowitz's claims are free-standing tort claims arising solely from the misconduct of his partners and their controlling parent corporation.

[4] A copy of Opinion of the Court of Appeals, Fifth District of Texas at

and before trial, Gibraltar Savings was placed into receivership by the RTC. Neither Shawmut nor FGMC has ever been placed into receivership by the RTC or any other agency.

The RTC removed this case to federal court from state court under the provisions of 12 U.S.C. § 1441a(1) (Supp. 1994) (R., V. 1: 4) and later filed a motion for summary judgment claiming that D'Oench, Duhme bars Robinowitz's claims (R., V. 3: 518). Robinowitz responded that D'Oench, Duhme is not applicable for several reasons (R., V. 3: 68; V. 6: 1428; V. 7: 1471, 1632; V. 9: 2040).

In January 1993, the District Court entered a memorandum opinion, order and

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Dallas, dated March 28, 1989, is included in the Appendix as Exhibit D.

final judgment granting the motion and dismissing Robinowitz's claims (R., V. 9: 2155, 2169). Robinowitz appealed to the Court of Appeals, and the District Court's opinion was affirmed on June 28, 1994.

Pertinent Facts

Gibraltar Savings is a failed, state-chartered savings and loan association.

Shawmut is an ordinary business corporation, originally owned by Gibraltar Savings, which was sold after the Robinowitz buy-out, before suit was filed, and more than two years before Gibraltar Savings failed.

FGMC is an ordinary business corporation which was originally a subsidiary of Shawmut, and which became a

direct subsidiary of Gibraltar Savings after the Shawmut sale. It is still a subsidiary of Gibraltar Savings.

Neither Shawmut nor FGMC have ever been financial institutions or in anywise involved in the banking business. Both are commercial corporations.

* * * * *

The operative facts are generally uncontested.

Robinowitz entered into two partnerships with the Defendants in 1985 to develop a $500 million mixed-use real estate project in Metairie, Louisiana (R., V. 11: 2193, 2208; V. 12: 2586, 2600). His partners were Shawmut and FGMC, both of whom were then wholly-owned subsidiaries of Gibraltar Savings with

Shawmut being the parent of FGMC. The partnership agreements provided for joint management of the project, and the Defendants were actively involved with Robinowitz in every phase of the development.

Construction began in 1985 on a large office building, a food court, a health club, and a hotel to be funded in part by a third party (R., V. 11: 2208). After the beginning of construction, the New Orleans economy softened and the third party declined to fund its part of the hotel (R., V. 11: 2195). The Defendants agreed to supply the funding in exchange for an increased interest in the hotel.

However, Gibraltar delayed the closing of the funding arrangement and

began causing construction delays which, in turn, created critical problems with pre-leasing the office building (R., V. 11: 2196). As the problems mounted, Robinowitz saw the project crumbling before his eyes and grew frantic in his efforts to persuade his partners to live up to their agreement. The Defendants, however, ignored both Robinowitz's pleas and their contractual responsibilities.

Once they had elevated the pressure to an intolerable level, they met with Robinowitz (R., V. 11: 2196, 2535, 2536) to convince him that Gibraltar was going to firesale the project for whatever it would bring on the open market (R., V. 11: 2197, 2536). At first, Robinowitz refused to believe that Gibraltar would destroy the project with such alacrity,

but, as the pressure continued to mount and the Defendants reaffirmed their representations (R., V. 11: 2530, 2531), he finally came to believe that the project was going to be shut down. Thus, on this note, negotiations began for him to sell out to the Defendants (R., V. 11: 2198).

In the beginning, Robinowitz valued his interests at $20 million and asked for payment in that amount (R., V. 11: 2198). Gibraltar refused, delayed the negotiations, and began to further increase the pressure through a course of instructing contractors to stop work (R., V. 11: 2199, 2533, 2537), delaying progress payments, and delaying reimbursements of cash expenditures (R., V. 3: 687, Tabs A and E).

While Gibraltar was intentionally tightening the noose, Robinowitz became more and more vulnerable to attack. He soon became unable to meet operating expenses and debt service. Ultimately, he caved in and sold out for $3.5 million, far less than the value of his interests (R., V. 3: 687, Tabs A and E).

The real truth, however, was that the Defendants had intentionally put pressure on their partner and simultaneously misled him with repeated false statements. They had no intention of selling the project; they simply wanted Robinowitz out of the deal so that they could have it for themselves.[5] They

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[5] The chairman of Gibraltar's board, Herb Young, is recorded in Gibraltar minutes as having spoken of difficulties with Robinowitz and stating that Gibraltar was exploring

had no intention of shutting the project down.

Months later, in a deposition in an unrelated case, Jay Janis, a member of Gibraltar's board of directors and chairman of its executive committee, described Gibraltar's true attitude about the project as follows:

> There would be simply no reason to sell a building that was a multi-phase project and to sell the first phase specifically when the first phase was just being completed and the leasing up wasn't taking place. (Emphasis supplied.)
>
> So there was never an attempt to sell. There was an attempt to complete the entire building. There was no need to sell, no desire to sell, and furthermore there was no attempt on the part of

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opportunities to "proceed on our separate paths." (R., V. 12: 2553)

> Gibraltar basically to sell it at [the end of 1986]. (Emphasis supplied.)
>
> I believe it was always Gibraltar's intention to complete the Galleria [the project]. (Emphasis supplied.) (R., V. 12: 2766-68)

Gibraltar ultimately went public with its intent. Within days after Robinowitz sold out, its representative held a press conference and publicly stated that Gibraltar was in the project for the "long haul" (R., V. 12: 2778); that the project would "continue to expand as a miniature city of offices, retail and dining establishments and the finest executive fitness, entertainment, hotel and meeting facilities;" and that over "the next few years the Galleria plans to add three more office towers, an 800,000 square foot retail mall, and a

luxury residential tower." (R., V. 12: 2786).

Thus, in reality, the Defendants never intended to abandon the project, but rather used the false threat as a ploy which, when coupled with intentional financial pressure, forced out an unwanted partner.

Once Robinowitz learned the truth, he filed suit seeking the true value of what he had sold under false pretenses (R., V. 1: 30, 63).

ARGUMENT AND AUTHORITY

QUESTION 1 -- CONFLICT AMONG THE CIRCUITS.

Did the Court of Appeals improperly apply D'Oench, Duhme and 28 U.S.C. § 1823(e) to deny Robinowitz's "free-

standing" tort claims for fraud and breach of fiduciary duty?

* * * * *

There is a clear cut split among the Circuits as to whether or not D'Oench, Duhme and 28 U.S.C. § 1823 bar the prosecution of "free-standing" tort claims against the RTC and FDIC.

Four Circuits hold that such claims are not barred,[6] generally holding in

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[6] D.C. Circuit -- DuPont v. FDIC, 1994 WL 459933 (D.C. Cir. 1994); Sixth Circuit -- Commerce Federal Savings Bank v. FDIC, 872 F.2d 1280 (1989); Eighth Circuit -- Astrup v. Midwest Federal Savings Bank, 886 F.2d 1057 (1989) and Hanson v. FDIC, 13 F.3d 1247 (1994); Eleventh Circuit -- Vernon v. FDIC, 981 F.2d 1230 (1993) and Jones v. RTC, 7 F.3d 1006 (1993).

accordance with the Court's position as expressed in Vernon:[7]

> We simply do not think the D'Oench doctrine operates to bar free-standing tort claims that are not related to a specific asset acquired by the FDIC.

To the contrary, at least two Circuits -- the First and Fifth -- take the position that D'Oench, Duhme bars free-standing claims.[8] The Fifth Circuit's decision in this case is a good example of the contrary view:

> Robinowitz first argues that the D'Oench, Duhme doctrine and

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[7] 981 F.2d at 1233.

[8] First Circuit -- Timberland Design v. First Savings Bank for Savings, 932 F.2d 46 (1991); Fifth Circuit -- Bowen v. FDIC, 915 F.2d 1013 (1990), and Robinowitz v. Gibraltar Savings, 23 F.3d 951 (1994).

> § 1823 of FIRREA should not apply to bar his claim for breach of fiduciary duty because that claim is unrelated to a note or debt.
>
> * * * * *
>
> Robinowitz's argument that D'Oench, Duhme has no application because the suit is not related to a note or debt is therefore without merit.

The First Circuit's Timberland decision is not as explicit as the Fifth Circuit's Bowen case in that Timberland dealt with tort claims arguable arising from some sort of "secret agreement" rather than being wholly unrelated to any such arrangement as is the case in Robinowitz.[9] Most certainly, the

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[9] Several cases have avoided direct confrontation with the "free-standing" issue by managing to find some "secret agreement" appended to the tort claims.

Robinowitz decision is the furthest extension of the bar thus far in any Circuit.

The split is troublesome to the extent that the Eleventh Circuit asked this Court to speak on the issue in its Vernon opinion[10] when it wrote:

> We acknowledge there are courts that disagree with our limitation of the doctrine and perhaps the Supreme Court or Congress will shed light on the intended scope of the D'Oench decision in the near future. (Citing Bowen, Timberland, Astrup, and First State Bank.)

This case squarely presents the issue to this Court for consideration.

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[10] Supra, footnote 8, at 1234.

The Supreme Court gave birth to the D'Oench, Duhme doctrine in 1942[11] in a decision arising from a suit by the FDIC on a demand note. Forty-five years later, this Court spoke again in Langley v. FDIC,[12] another collection suit by the FDIC. The two cases taken together are the only Supreme Court cases on D'Oench, Duhme and therefore provide the ultimate guidance for interpreting the doctrine. Neither case dealt with free-standing tort claims.

In 1950, Congress enacted 12 U.S.C. § 1823(e), a much narrower counterpart to the common law doctrine.

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[11] D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942).

[12] 484 U.S. 86, 98 L.Ed.2d 340 (1987).

In the past five years, the Courts of Appeals have been called upon by the cleanup agencies to expand D'Oench, Duhme and § 1823(e) beyond their original boundaries, and in many cases, they have done so. Yet in some cases, they have refused, and the result is a myriad of decisions articulating policy far beyond the scope of this Court's two opinions.

D'Oench, Duhme, as expressed by this Court, is a federal common law rule of equitable estoppel which precludes obligors from claiming defenses arising from secret side agreements not reflected in the records of the failed institution. The rule is based upon the "federal policy to protect [FDIC], and the public funds which it administers against misrepresentation as to the securities or

other assets in the portfolios of banks which Respondent insures or to which it makes loans."[13] The essence of the theory is that a party cannot lend himself to a scheme to mislead banking authorities and later take advantage of his own improper acts.

D'Oench is generally regarded as having three objectives. The first is to allow bank examiners to rely upon a bank's records in evaluating a failed bank's assets. Second, depositors and creditors of a failed bank who cannot protect themselves are favored over the interests of borrowers who can. Third, bank officials are provided an incentive to give mature consideration to unusual

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13 D'Oench, Duhme, supra at 457.

lending arrangements in order to prevent fraudulent transactions.

Section 1823(e), unlike D'Oench, is a statutory mandate prohibiting the use of extrinsic agreements to diminish or defeat the FDIC's interest in an asset unless those agreements meet specific requirements. The Congressional purpose, like D'Oench, is to allow examiners to rely on banks' records; but unlike D'Oench, there is no concept of estoppel arising from the borrower's conduct.

This Court has never articulated any policy which, by any stretch of the imagination, extinguishes free-standing torts, particularly claims like those asserted by Robinowitz in this case.

Robinowitz was not a borrower and certainly did not lend himself to any

scheme or arrangement to mislead bank examiners. He is a victim, not a culprit. He did nothing to prevent a full and complete evaluation of Gibraltar Savings' records by examiners and, in fact, his claims were fully spread through the files years before the examiners ever arrived at Gibraltar's door.

Nor is there any reason to superimpose the interest of depositors and creditors over Robinowitz's interests. He is, after all, a creditor not a borrower. He is one of the two classes who are supposedly protected by D'Oench from unsavory borrowers.

And last, the denial of Robinowitz's claims will provide no incentive to bank officials to give special attention to

unusual lending arrangements. He was not a borrower so there were no lending arrangements, and indeed, the persons who defrauded him were the very officials who supposedly are encouraged by D'Oench, Duhme to act honestly.

These considerations are aptly summarized in the Eleventh Circuit's Jones v. Resolution Trust Corp.[14] case when the Court said:

> Jones is not seeking to enforce any secret or unwritten "agreement," so it is difficult to see how D'Oench or § 1823(e) could apply to his claims. No one is likely to memorialize an agreement or intention to commit a tort. Nor does the commission of a tort have any bearing on the validity of an institution's assets as recorded such that the bank examiners are likely to be misled, the issue that

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[14] 7 F.3d 1006 (11th Cir. 1993).

> concerned the Supreme Court in D'Oench. Although this may seem to be an artificial distinction, it is one that appears to be compelled by the language of the statute. Moreover, as we discuss below, while it would certainly be consistent with the rest of congressional policies expressed through the FIRREA if we were to decide that the RTC...is simply not subject to the tort claims of those who deal with it, that is not what § 1823(e) says, and we think it an unwarranted extension of the language to engraft that reading upon either D'Oench or 1823(e).

Even though the issue involves a balancing of the public interest on one hand versus the rights of the individual on the other, there must be limits on the extent to which this Court will allow encroachment upon an innocent party's rights. At one end of the spectrum is the judicial attitude of safeguarding

individuals' rights as set forth by the Eleventh Circuit, and at the other end is the disregard of those rights by the Fifth Circuit.[15]

In the final analysis, free-standing tort claimants are creditors of failed institutions and should be treated as such. They are no different from landlords, negligence victims, or other similarly situated claimants. They are not borrowers. There is no valid federal policy to be served by preferring one class of creditors over another, and certainly this Court should not set forth any standard which, in its final result,

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[15] The Fifth Circuit's position is particular confusing in light of its proclamation that D'Oench is not a limitless guarantee of victory by federal banking agencies. Alexandria Associates, Ltd. v. Mitchell Co., 2 F.3d 598, 601 (5th Cir. 1993).

frees the failed institution from paying its just debts, the very evil which D'Oench, Duhme was designed to prevent.

QUESTION 2 -- DEPARTURE FROM ACCEPTED AND USUAL COURSE; UNSETTLED RULE OF FEDERAL LAW

Did the Court of Appeals improperly extend the protection of D'Oench, Duhme and 28 U.S.C. § 1823(e) to a failed institution's subsidiary which had been sold two years prior to the failure?

* * * * *

The Court of Appeals extended D'Oench, Duhme and § 1823(e) to bar Robinowitz's claims against Shawmut, a separate, non-banking corporation which had been sold by Gibraltar Savings two years before it failed. The Court's

reasoning is ostensibly that federal regulators have to rely upon a financial institution's records to determine solvency, including both parents' and subsidiaries' records. Such reliance, according to the Court, is necessary to enable regulators to persuade solvent banks to assume the accounts of the failed institutions.

This reasoning simply ignores the facts.

Here, Shawmut was sold by Gibraltar Savings to a third party two years before Gibraltar failed. Thus, neither the solvency nor the books and records of Shawmut had anything to do with the solvency of Gibraltar Savings. There was nothing for the regulators to see!

In fact, Robinowitz's claims were well known to the failed institution and readily available to the regulators. His suit had been filed almost two years before the failure, and Gibraltar Savings had dozens of pleadings as well as the Texas appellate court's decision in its records when the regulators arrived.

It is illogical at best to extend protection designed for a federally insured, banking institution to a commercial corporation which was never anything but a subsidiary, and which had been sold years before the issue of Gibraltar's solvency ever arose.

Shawmut is a purely commercial enterprise organized to compete for profit in the open market. It is not subject to bank examiners' scrutiny, its

funds are not federally insured, and it cannot be placed into receivership by federal banking authorities. It did not make loans, accept deposits, or conduct banking activities.

What then can possibly be the policy justification for arming private corporations competing against the private sector with the "superdefenses" available to failed lending institutions?

The answer is that there is none. The public policy of preserving federally insured funds in the highly regulated banking industry is wholly inapplicable to non-banking subsidiaries, particularly those which have long ago been sold to a third party.

QUESTION 3 -- DEPARTURE FROM ACCEPTED AND USUAL COURSE

Did the Court of Appeals improperly refuse to apply its own non-banking exception to D'Oench, Duhme and 28 U.S.C. § 1823(e) in this case?

* * * * *

The Fifth Circuit held in Alexandria Associates that D'Oench, Duhme does not bar claims related to non-banking transactions, yet the panel in this case refused to apply the exception even though the facts required it.

In Alexandria Associates, non-banking subsidiaries of a financial institution sold and financed partnership interests in real estate ventures to Alexandria Associates. Alexandria

claimed that the subsidiary made various misrepresentations upon the sale of the partnership interests resulting in foreclosure of the property and the loss of its $400,000 down payment.

In holding that D'Oench, Duhme did not apply, the court stated:

> The Mitchells were engaged in the ordinary commercial sale of non-bank assets - partnership interests in real estate development ventures. These sales assuredly were non-banking transactions; banks simply do not engage in the sale of partnership interests in real estate development ventures in the ordinary course of banking business.[16]

The same reasoning applies here. In both Alexandria Associates and this case, the defendants were partners in the

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[16] 2 F.3d at 603.

development of raw land; here a multi-phase project in Metairie; in Alexandria Associates, the development of an apartment building. In both cases, there were sales of joint venture interests. Here, the Defendants were the purchasers; in Alexandria Associates, they were the sellers; otherwise, there is no difference. In both cases, the defendants' intentions were identical -- they joined with others to purchase, develop and own real estate for profit, nothing more and nothing less.

The panel refused to follow Alexandria Associates, distinguishing it ostensibly because of an alleged lending relationship with Robinowitz. There was no such relationship. Robinowitz borrowed no money, executed no loan

agreements, and executed no mortgages. He owes nothing to any of the Defendants and has never owed them anything. The only lending relationship involved was between the parties' partnerships and Gibraltar, not Robinowitz. If there was a lending relationship, it was among the Defendants as much as it was with Robinowitz.

The court's statement to the contrary is simply wrong.

The court's distinction also makes no sense because in Alexandria Associates, the non-banking subsidiary did loan money to Alexandria to purchase partnership interests. Thus, there is simply no real distinction between the two cases except for the composition of the panel which decided them.

The panel was bound to follow its own circuit's controlling precedent. Its inexplicable refusal to do so resulted in the dismissal of Robinowitz's claims, and he respectfully requests that the appellate court be instructed to apply its own precedent and reinstate the claims.

QUESTION 4 -- DEPARTURE FROM ACCEPTED AND USUAL COURSE; UNSETTLED RULE OF FEDERAL LAW

Did the Court of Appeals improperly apply D'Oench, Duhme and 28 U.S.C. § 1823(e) since the books and records of the failed institution fully disclosed Robinowitz's claims at the time of the failure?

* * * * *

In Langley,[17] this Court articulated two policy reasons behind the disclosure requirements explicit in FIRREA and implicit under the D'Oench, Duhme doctrine: (1) "to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets;" and (2) "to ensure mature consideration of unusual loan transactions, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure." Robinowitz's claim meets both policy requirements.

What then did Gibraltar's books and records disclose at the time they were placed into receivership?

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[17] Supra.

Robinowitz's lawsuit was filed two years before the RTC's appointment as receiver for Gibraltar Savings on October 30, 1989. In those two years, the following had occurred: (1) summary judgment was entered in favor of Defendants on the release; (2) the issue was appealed to, and decided by, the state appellate court; (3) writ of error was denied by the Supreme Court; (4) the case was remanded back to state court for trial; (5) the Court of Appeals had written an opinion specifically discussing the release and its lack of effect on Robinowitz's claim; (6) the files contained an indemnity agreement between Shawmut and Gibraltar; (7) Shawmut had made a claim under the indemnity agreement on December 15, 1987;

(8) Gibraltar Savings acknowledged by letter that the lawsuit was covered by the indemnity agreement; (9) interrogatories and requests for production had been propounded and answered; and (10) depositions of all key witnesses had been taken.

In short, the examiners had full notice of the substance, nature, and amount of Robinowitz's claim, and thus were not prevented from accurately evaluating the failed institution's assets and liabilities.

Robinowitz in no way thwarted the second policy reason behind the disclosure requirements relating to loans because his claims have nothing to do with a loan transaction.

The court's blind application of D'Oench, Duhme is not warranted by either the language of the doctrine or the policies underlying it. The RTC has not and cannot dispute that it had full notice of Robinowitz's claim when it took over Gibraltar Savings. As this Court held in Coit Independence Joint Venture v. FSLIC,[18] where suit has already been filed against a thrift before receivership, the receiver "will receive notice of those claims when it steps into the shoes of the failed savings and loan and takes control of its assets."[19] It is hard to envision an instance in which a claim was more documented on an

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[18] 109 S.Ct. 1361 (1989).

[19] Id. at 1374-1375.

institution's books and records than Robinowitz's was in this case.

Moreover, Gibraltar's fraudulent misrepresentations are not the type of matters that are required to be recorded in regular banking records.[20] In other words, bank examiners would not expect to find fraudulent misrepresentations relating to a non-banking transaction recorded in the bank's records. To hold otherwise is disingenuous.

In summary, the Langley policies underlying the disclosure requirements have been met and exceeded in this case.

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[20] In re Geri Zahn, Inc., Federal Deposit Insurance Corporation v. Govaert, 25 F.3d 1539 (11th Cir. 1994).

CONCLUSION

The Court of Appeals both improperly applied and improperly extended D'Oench, Duhme and § 1823(e) in this case to (1) bar free-standing torts, (2) extend protection to a commercial subsidiary sold two years prior to the failure of the financial institution, (3) refuse to apply the non-banking exception, and (4) deny claims which were fully disclosed on the failed institution's books and records.

Robinowitz requests that this Court grant his Petition, and that upon final decision, the judgment of the Court of Appeals be reversed, for his costs, and for such other relief to which he may be entitled.

Respectfully submitted,

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TX Bar No. 19870000

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DANIEL P. ROBINOWITZ

Supreme Court, U.S.
FILED

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

DANIEL P. ROBINOWITZ,
Petitioner,

VS.

RESOLUTION TRUST CORPORATION, as Receiver for Gibraltar Savings, FGMC INVESTMENT CORPORATION, and SHAWMUT FIRST MORTGAGE CORPORATION,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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APPENDIX

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ATTORNEYS FOR PETITIONER
DANIEL P. ROBINOWITZ

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EXHIBIT A

Daniel P. ROBINOWITZ,
Plaintiff-Appellant,

v.

GIBRALTAR SAVINGS,
et al. Defendants,

FGMC Investment Corp., Shawmut First Mortgage Corp., f/k/a First Gibraltar Mortgage Corp., and Resolution Trust Corporation, as receiver for Gibraltar Savings, Defendants - Appellees.

No. 93-1097

United States Court of Appeals,
Fifth Circuit.

June 28, 1994.

Borrower brought action against failed bank and its subsidiaries for breach of fiduciary duty, fraud, misrepresentation, and declaratory judgment. Thereafter, the Resolution Trust Corporation (RTC) was appointed

receiver for failed bank and it intervened in state court action, removing it to District Court. The United States District Court for the Northern District of Texas, Jorge A. Solis, J., granted summary judgment in favor of RTC, and borrower appealed. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that: (1) D'Oench, Duhme doctrine applied to bar all of borrower's claims based on alleged oral misrepresentations made by officers of failed bank, and (2) D'Oench, Duhme doctrine was available to wholly owned subsidiaries of failed bank.

Affirmed.

1. **Building and Loan Associations**

Although claim was unrelated to note or debt, D'Oench, Duhme doctrine and codified version of that doctrine applied to borrower's claim that failed bank for which Resolution Trust Corporation (RTC) was appointed receiver and its subsidiaries breached their fiduciary duties to him by orally fraudulently inducing him to sign release and sell his partnership interest in development. Federal Deposit Insurance Act, § 2[13](e), as amended, 12 U.S.C.A. § 1823(e).

2. **Building and Loan Associations**

Borrower's claim that misrepresentations by failed bank, for which Resolution Trust Corporation (RTC) was appointed receiver, and its subsidiaries that bank was withdrawing support for

development project induced him to enter settlement agreement was barred by D'Oench, Duhme doctrine, where alleged misrepresentations were not written or recorded. Federal Deposit Insurance Act, § 2[13](e), as amended, 12 U.S.C.A. § 1823(e).

3. Banks and Banking

D'Oench, Duhme defense is available to wholly owned subsidiaries of insurance institution. Federal Deposit Insurance Act, § 2[13](e), as amended, 12 U.S.C.A. § 1823(e).

4. Banks and Banking

Key factor in application of D'Oench, Duhme doctrine is whether borrower lent himself to scheme or arrangement whereby banking authorities are likely to be misled. Federal Deposit

Insurance Act, § 2[13](e), as amended, 12 U.S.C.A. § 1823(e).

5. Building and Loan Associations

Borrower who alleged that failed bank, for which Resolution Trust Corporation (RTC) was appointed receiver, and its subsidiaries breached fiduciary duties owed to borrower by fraudulently inducing him to sign release and sell his partnership interest in development lent himself to scheme or arrangement whereby banking authorities were likely to be misled and, therefore, D'Oench, Duhme doctrine barred claim, where borrower failed to include in settlement agreement alleged oral condition that he was selling his interest in development because bank was withdrawing its support. Federal Deposit Insurance Act,

§ 2[13](e), as amended, 12 U.S.C.A. § 1823(e).

6. Building and Loan Associations

D'Oench, Duhme doctrine applied to bar borrower's claim that failed bank, for which Resolution Trust Corporation (RTC) was appointed receiver, and its subsidiaries breached their fiduciary duties to him by fraudulently inducing him to sign release and sell his partnership interest in development, even though borrower alleged that real estate transaction was outside scope of traditional banking function, in view of evidence that bank's primary relationship with borrower was as lender, that bank had about $100 million in outstanding loans on development, and that bank and subsidiaries sought to settle disputes

over financing of development, not to make ordinary commercial investment. Federal Deposit Insurance Act, § 2[13](e), as amended, 12 U.S.C.A. § 1823(e).

Appeal from the United States District Court for the Northern District of Texas.

Before POLITZ, Chief Judge, KING and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Daniel Robinowitz appeals the district court' grant of summary judgment to the RTC based on its holding that all of Robinowitz's claims are barred by the D'Oench, Duhme doctrine. We affirm.

I.

In 1983, Daniel Robinowitz (Robinowitz) approached Gibraltar Savings for financing. He and FGMC Investment Corporation (FGIC) entered into a partnership to purchase land for the development of the Galleria project, a "multi-use" development to be built in several phases in Metaire, Louisiana. FGIC was the subsidiary of First Gibraltar Mortgage Corporation (Shawmut).[1] Shawmut was the subsidiary of Gibraltar Savings. Gibraltar Savings provided $9 million of financing for the purchase.

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[1] In December 1986, Gibraltar Savings sold the stock of First Gibraltar Mortgage Corporation to Shawmut Bank who later sold its stock to El Paso Federal Savings Association. In 1991, the RTC was appointed receiver for El Paso.

In 1985, Galleria Land, Ltd., a limited partnership with Robinowitz as one of its managing general partners, entered into a joint venture with FGIC to hold the land purchased for the Galleria project. FGIC also entered into a joint venture with Galleria Phase I., Ltd., also a limited partnership with Robinowitz as one of its managing partners, to develop the first phase of the Galleria project. The joint venture agreements provided for joint control and provided that Galleria Phase I, Ltd. was primarily responsible for the development and management of the first phase while FGIC was primarily responsible for obtaining financing for the project.

The first phase of the Galleria project included the construction of a

hotel to be funded in part by Embassy Suites. After the construction of the hotel began, the New Orleans economy softened, and Embassy Suites refused to fund the hotel. Gibraltar Savings agreed to loan the additional money needed for the hotel in exchange for an increased ownership interest in it.

By 1986, serious disputes had developed between Robinowitz and FGIC and Gibraltar Savings. The RTC asserts that Robinowitz threatened to sue FGIC and Gibraltar Savings and that FGIC and Gibraltar Savings became concerned about their significant financial commitment to the project in the softening real estate market. The parties entered into discussions to settle their disputes. According to Robinowitz, Gibraltar

Savings told him at the settlement meeting that it was not going to continue to fund the hotel and that it was going to sell the Galleria project for whatever it could get. Robinowitz argues that because of these representations, he decided to sell his interest in the project to Gibraltar Savings.

Initially, Robinowitz agreed to sell his interest for $20 million. Gibraltar Savings refused to pay this amount, and Robinowitz contends that Gibraltar Savings pressured him into settling by instructing the contractor to stop working and by delaying progress payments and requests for reimbursement. Because Robinowitz was unable to meet his operating expenses and debt service, he

agreed to sell his interest for $3.5 million.

Robinowitz then entered into a Settlement and Mutual Release Agreement with Gibraltar Savings, Shawmut and FGIC. In that agreement, Gibraltar Savings and its subsidiaries released Robinowitz from his obligations under the joint venture agreements. In return, Robinowitz released FGIC and Gibraltar Savings from all claims and causes of action that Robinowitz had in connection with any "dealings, transactions, agreements or understandings" with any of the Defendants, "which have occurred prior to the date of this Mutual Release."

Robinowitz alleges that, contrary to its representations, Gibraltar Savings had no intention of selling the project,

but instead intended to squeeze him out of the project. He alleges that the day before the parties executed the Settlement and Mutual Release Agreement, Gibraltar Savings hired a long-term manager for the Galleria project.

Robinowitz filed suit in state court for breach of fiduciary duty, fraud, misrepresentation, and declaratory judgment against Gibraltar Financial of California (a holding company that owned all of Gibraltar Savings' stock),[2] Gibraltar Savings, Shawmut and FGIC. Robinowitz alleged that the Defendants breached their fiduciary duties to him by fraudulently inducing him to sign the

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[2] Gibraltar Financial settled with Robinowitz and was dismissed in February 1993.

release and to sell his partnership interests. Specifically, he alleged that the Defendants misrepresented their true plans regarding the Galleria project in order to induce him to sell his interest in the project for a price well below the real value.

In 1988, the state trial court granted Defendants' motion for summary judgment, ruling that Robinowitz's claims were foreclosed by the Mutual Release and Settlement Agreement. However, the Texas court of appeals reversed and remanded for trial, finding that a fact issue existed as to "whether Gibraltar made material misrepresentations which were

fraudulent and in violation of its fiduciary duty."[3]

On October 30, 1989, the RTC was appointed receiver for Gibraltar Savings and intervened in the state court action, removing it to district court. The RTC, Shawmut, and FGIC then filed a motion for summary judgment on the grounds that Robinowitz's claims were barred by the D'Oench, Duhme doctrine and related statutes. The district court granted Defendants' motion, holding that because Gibraltar Savings' misrepresentations did not appear in the Settlement and Mutual Release agreement or on any document on

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[3] The Court of Appeals labeled the Defendants collectively "Gibraltar." Thus, it is unclear which Defendants the court determined owed a fiduciary duty to Robinowitz.

file with Gibraltar Savings, Robinowitz had "lent himself to a scheme or arrangement whereby banking authorities are likely to be misled." Robinowitz timely appealed.

II.

The party moving for summary judgment "bears the initial responsibility for informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)

(citations omitted). If the non-movant is faced with a motion for summary judgment "made and supported" as provided by Rule 56, the non-movant cannot survive the motion by resting on the mere allegations of its pleadings. See Id.; Slaughter v. Allstate Ins. Co., 803 F.2d 857, 860 (5th Cir. 1986).

Robinowitz makes several arguments as to why D'Oench, Duhme should not apply to this case. First, he contends that D'Oench, Duhme does not apply because the suit does not involve a note or debt. Second, he argues that the doctrine does not apply to bar claims for breach of fiduciary duty. Next, he argues that D'Oench, Duhme does not bar his claims against FGIC and Shawmut because they are subsidiaries of a failed insured savings

and loan institution and not entitled to the jurisprudential and statutory bar. Robinowitz then argues that the RTC's knowledge at the time of suit serves to preclude application of D'Oench. Finally, Robinowitz argues that the transaction, the settlement of real estate partnership agreements with a lender, is not a banking function and is therefore not covered by D'Oench, Duhme. We consider these arguments below.

III.

A.

[1] Robinowitz first argues that the D'Oench, Duhme doctrine and § 1823 of FIRREA should not apply to bar his claim for breach of fiduciary duty because that

claim is unrelated to a note or debt.[4] According to Robinowitz, D'Oench, Duhme applies only when a party is attempting to use an unrecorded agreement as a defense to collection efforts by a receiver of a debt or obligation.

Our cases do not support Robinowitz's argument for such a narrow

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[4] Section 1823 of FIRREA is the statutory codification of the common law D'Oench, Duhme doctrine. It provides that "[n]o agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement -- 1) is in writing, 2) was executed by the depository institution... 3) was approved by the board of directors of the depository institution or its loan committee,... and 4) has been, continuously, from the time of its execution, an official record of the depository institution." 12 U.S.C. § 1823(e) (1989).

application of D'Oench, Duhme. We have held that D'Oench, Duhme also applies in a case "with an affirmative claim, against FDIC-Receiver, with no note whose terms are subjected to a secret protocol." Bowen v. FDIC, 915 F.2d 1013, 1015 (5th Cir. 1990); see also Beighley v. FDIC, 868 F.2d 776, 783-84 (5th Cir. 1989) (holding that D'Oench, Duhme barred the plaintiff's claims for breach of contract, breach of fiduciary duty, promissory estoppel, and fraud arising from an unwritten agreement by the bank to finance a third party's purchase of collateral from the plaintiff).

Robinowitz's argument that D'Oench, Duhme has no application because the suit is not related to a note or debt is therefore without merit.

B.

Robinowitz next argues that although courts have, in dicta, purported to apply D'Oench, Duhme to bar claims for breach of fiduciary duty where no fiduciary relationship was proven, no cases have held that D'Oench, Duhme bars claims for breach of fiduciary duty where the fiduciary relationship is established. He argues that the fiduciary relationship has been established here because he and the Defendants entered written partnership agreements. He argues that his claim is based on these agreements, not Defendants' oral assertion that they were going to stop financing the project.

[2] We disagree. Even assuming proof of a fiduciary relationship,[5] Robinowitz's claims are based not on any partnership agreements but on Defendants' alleged oral misrepresentation during the settlement meeting about their future intentions to immediately dispose of the Galleria project. According to

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[5] The RTC argues that there is no fiduciary relationship between Gibraltar Savings and Robinowitz because Gibraltar Savings was not a party to any of the joint ventures and argues there is no fiduciary relationship between Robinowitz and Shawmut because Shawmut was a partner only under the 1983 joint venture that terminated in 1985. However, the Texas court of appeals in reversing the state court's grant of summary judgment to the bank found that there was a fact issue as to "whether [defendants] made material misrepresentations which were fraudulent and in violation of its fiduciary duty." The district court did not discuss whether Robinowitz had established a fiduciary duty between himself and Defendants.

Robinowitz, this alleged representation induced him to sign the Settlement Agreement. The alleged misrepresentation was not written or recorded according to the requirements of § 1823.

Robinowitz's claim is analogous to one for fraudulent inducement which is barred by D'Oench, Duhme. Langley v. FDIC, 484 U.S. 86, 108 S.Ct. 396, 98 L.Ed.2d 340 (1987). In Langley, the plaintiffs claimed that the Bank fraudulently induced them to borrow funds to invest in property by orally misrepresenting the size of the property. The Court held that the oral misrepresentation regarding the nature of the property was sufficient to constitute an "agreement" within the meaning of § 1823. Id. at 92, 108 S.Ct. at 401. It then

held that even if the misrepresentation was fraudulent, § 1823 still barred a claim based on the representation unless it met the recording requirements. Id. at 93-94, 108 S.Ct. at 402. Robinowitz's claim that an oral misrepresentation fraudulently induced him to enter the settlement agreement, like the Langleys' claim that the bank's oral misrepresentation regarding the property induced them to borrow funds, is also barred by D'Oench, Duhme. See also, FDIC v. Payne, 973 F.2d 403 (5th Cir. 1992) (D'Oench, Duhme doctrine bars Payne's claim of fraudulent inducement based on bank's oral misrepresentation about financial condition of person Payne agreed to guarantee); Beighley v. FDIC, 868 F.2d at 784 n. 12 (D'Oench, Duhme bars Beighley's

claim for breach of fiduciary duty arising out of bank's alleged oral agreement to finance the purchase of collateral property).

C.

Next, Robinowitz argues that even if D'Oench, Duhme applies to bar claims based on fraudulent inducement, it does not bar claims against subsidiaries and sub-subsidiaries of protected institutions.[6] This circuit has not yet addressed whether subsidiaries may assert defenses available under D'Oench, Duhme.

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[6] Shawmut was a wholly-owned subsidiary of Gibraltar Savings and FGIC was a wholly-owned subsidiary of Shawmut at the time of the events giving rise to Robinowitz's claims. Shawmut's stock was sold in 1989 to El Paso Savings Association, which was put into receivership in 1991.

See, Alexandria Associates v. Mitchell, 2 F.3d 598, 601 n. 10 (5th Cir. 1993) (choosing not to address issue).

At least three other circuits have addressed this issue. All of them reached the conclusion that wholly-owned subsidiaries of failed institutions may also assert D'Oench, Duhme defenses to bar claims based on secret or oral agreements. See, Sweeney v. RTC, 16 F.3d 1 (1st Cir. 1994) (D'Oench, Duhme extends to the financial interest of any wholly owned subsidiary of a failed institution); Oliver v. RTC, 955 F.2d 583, 585-86 (8th Cir. 1992) ("D'Oench doctrine extends broadly to cover any secret agreement adversely affecting the value of a financial interest that has come within the RTC's control as receiver of a

failed financial institution" including the financial interest of wholly-owned subsidiaries); Victor Hotel Corp. v. FCA Mortgage Corp., 928 F.2d 1077 (11th Cir. 1991) (same).

[3] We agree with our sister circuits that the D'Oench, Duhme defense is available to wholly owned subsidiaries of the insured institution. Federal regulators have to "rely on a financial institution's records and its assets, such as wholly-owned subsidiaries, to determine solvency for regulatory purposes." Victor Hotel, 928 F.2d at 1083. They must be able to examine the records of the subsidiary, as well as the parent, especially since the subsidiary may constitute a major asset of the parent. Such reliance is necessary to

enable the federal regulators to persuade solvent banks to assume the accounts of the failed institutions. Therefore, the district court correctly extended the D'Oench, Duhme defense to Shawmut and FGIC.

D.

[4, 5] Robinowitz next argues that if RTC has knowledge of the side agreement or secret promise, then D'Oench, Duhme does not apply. Robinowitz asserts that the RTC knew about his claim at least two years before the RTC took over Gibraltar Savings. Robinowitz's suit had been pending against Shawmut for two years and had been appealed to the Texas appellate and Texas Supreme Court before RTC assumed Gibraltar Savings. However,

the Supreme Court has already addressed this issue and held that knowledge by the FDIC is irrelevant:

> [K]nowledge of the misrepresentation by the FDIC prior to its acquisition of the note is not relevant to whether § 1823(e) applies.... An agreement is an agreement whether or not the FDIC knows of it. The statutory requirements that an agreement be approved by the bank's board or loan committee and filed contemporaneously in the bank's records assure prudent consideration of the loan before it is made, and protect against collusive reconstruction of the loan terms by bank officials and borrowers.... Knowledge by the FDIC could substitute for the latter protection only if it existed at the very moment the agreement was concluded, and could substitute for the former assurance not at all.

Id. at 94-95, 108 S.Ct. at 402-403. See also, Bell & Murphy v. Interfirst, 894

F.2d 750, 753 (5th Cir.), cert. denied, 498 U.S. 895, 111 S.Ct. 244, 112 L.Ed.2d 203 (1990) (D'Oench bars claim even though lawsuit was filed against financial institution before it was declared insolvent). The key factor in the application of the D'Oench, Duhme doctrine is whether the borrower "lent himself to a scheme or arrangement whereby banking authorities are likely to be misled." Bowen v. FDIC, 915 F.2d 1013, 1015 (5th Cir. 1990) (quoting D'Oench). Robinowitz lent himself to such a scheme or arrangement when he failed to include in the Settlement Agreement the alleged condition, that he was selling his interest in the project because Gibraltar Savings was withdrawing its support. McMillan v. MBank Fort

Worth, N.A., 4 F.3d 362, 368 (5th Cir. 1993).

E.

Finally, Robinowitz argues that the real estate partnership transactions at issue here are outside the traditional banking function, and therefore are not covered by D'Oench, Duhme. He relies on the recent decision in Alexandria Associates, Ltd. v. Mitchell Co., 2 F.3d 598 (5th Cir. 1993), in which this court declined to apply D'Oench, Duhme to the commercial sale of partnership interests in a real estate development venture by a third generation subsidiary of a failed institution.

In Alexandria, the third generation subsidiary of Altus Bank, the Mitchells,

formed limited partnerships to build, own and operate apartment building complexes through HUD financing. They sold partnership interests in the apartment complexes to plaintiffs, LaSala and Alexandria. Alexandria then attempted to syndicate its partnership interests, in order to pay off its purchase loan indebtedness, and when its attempts failed, sued the Mitchells alleging common law fraud and violations of state securities law based on the Mitchells' oral misrepresentations of the value of the property. Id. at 600. This court declined to extend D'Oench, Duhme to these non-banking transactions: "[B]anks simply do not engage in the sale of partnership interests in real estate

development ventures in the ordinary course of banking business."[7]

[6] Alexandria is distinguishable from today's case and does not control it. Although Gibraltar Savings had a proprietary interest in the real estate at issue, its primary relationship with Robinowitz was as a lender. Unlike the parent bank in Alexandria, which did not make any loans on the project, Gibraltar Savings had about $100 million in outstanding loans on the Galleria project; including $69 million in permanent loan commitments and $9 million that

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[7] This court recognized that a regulatory agency serving as a conservator or receiver of a failed institution might engage in liquidation of that bank's assets and be within the D'Oench, Duhme doctrine. Id. at 603, n. 30.

Robinowitz borrowed to fund the original land purchase. Thus Gibraltar was performing a quintessential banking function. One of Robinowitz's main complaints is that Gibraltar Savings tightened the funding spigot to pressure him into selling his interest. The Defendants here sought to settle disputes over their financing of a project, not to make an ordinary commercial investment. Therefore, D'Oench, Duhme applies to bar Robinowitz's claims. OPS Shopping Center v. FDIC, 992 F.2d 306 (11th Cir. 1993) (D'Oench, Duhme applies to bar claims involving ordinary banking transactions).

IV.

D'Oench, Duhme applies to bar all of Robinowitz's claims based on alleged oral

misrepresentations made by officers of a failed institution. We therefore AFFIRM the judgment of the district court.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DANIEL P. ROBINOWITZ,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	
GIBRALTAR SAVINGS, GIBRALTAR FINANCIAL CORPORATION, SHAWMUT MORTGAGE CORP. f/k/a FIRST GIBRALTAR MORTGAGE CORP., and FGMC INVESTMENT CORPORATION,	§	CIVIL ACTION NO. 3:90-2694-P
	§	
Defendants	§	
	§	
RESOLUTION TRUST CORPORATION, as Receiver for Gibraltar Savings,	§	
	§	
Intervenor	§	

FINAL JUDGMENT

This action came on before the court on Refiled Motion for Summary Judgment by Defendant Resolution Trust Corporation as

Receiver ("RTC") and FGMC Investment Corporation ("FGMC"), filed November 26, 1991, and Motion by Shawmut Mortgage Corp. ("Shawmut") for Summary Judgment, filed November 29, 1992, and the issues having been fully considered and a decision having been rendered.

The Court hereby ORDERS that the Motions for Summary Judgment of Defendants Shawmut Mortgage Corporation, FGMC Investment Corp., and the Resolution Trust Corporation as Receiver for Gibraltar Savings are hereby GRANTED in its entirety, and that the claims brought by Plaintiff Daniel P. Robinowitz are hereby DISMISSED.

It is FURTHER ORDERED, ADJUDGED and DECREED that all relief not specifically granted herein is DENIED.

SIGNED this 21st day of January, 1993.

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

EXHIBIT C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1097

DANIEL P. ROBINOWITZ,
Plaintiff-Appellant,

versus

GIBRALTAR SAVINGS, ET AL.
Defendants,

FGMC INVESTMENT CORP., SHAWMUT FIRST MORTGAGE CORP., f/k/a First Gibraltar Mortgage Corp., and RESOLUTION TRUST CORPORATION, as receiver for Gibraltar Savings,
Defendants-Appellees.

Appeal from the United States
District Court for the
Northern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 06/28/94, 5 Cir., 1994, F.3d __)

(September 19, 1994)

Before POLITZ, Chief Judge, KING and DAVIS, Circuit Judges.

PER CURIAM:

(x) Treating the Suggestion(s) for Rehearing En Banc as (a) Petition(s) for Panel Rehearing, the Petition(s) for Panel Rehearing is (are) DENIED. No member of the panel nor Judge in regular active service of the Court having requested that the Court be polled on rehearing en banc (FRAP and Local Rule 35), the Suggestion(s) for Rehearing En Banc is (are) also DENIED.

( ) Treating the Suggestion(s) for Rehearing En Banc as (a) Petition(s) for Panel Rehearing, the Petition(s) for Panel Rehearing is (are) DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor

(FRAP and Local Rule 35), the Suggestion(s) for Rehearing En Banc is (are) DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

EXHIBIT D

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

No. 05-88-00478-CV

DANIEL P. ROBINOWITZ, APPELLANT,

v.

GIBRALTAR SAVINGS, GIBRALTAR FINANCIAL CORPORATION OF CALIFORNIA, SHAWMUT FIRST MORTGAGE CORP. f/k/a FIRST GIBRALTAR MORTGAGE CORP. and FGMC INVESTMENT CORP.

APPELLEES.

FROM A DISTRICT COURT OF DALLAS COUNTY, TEXAS

BEFORE JUSTICES THOMAS, BURNETT[1]
AND WHITTINGTON[2]
OPINION BY JUSTICE THOMAS
MARCH 28, 1989

This is an appeal from a summary judgment in favor of appellees, Gibraltar Savings, Gibraltar Financial Corp. of California, Shawmut First Mortgage Corp. f/k/a First Gibraltar Mortgage Corp. and FGMC Investment Corp. (Gibraltar). Appellant, Daniel P. Robinowitz, in a

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[1] The Honorable Joe Burnett, Justice, succeeded the Honorable Bill J. Stephens, a member of the original panel, at the expiration of his term on December 31, 1988. Justice Burnett has reviewed the briefs and the record before the court.

[2] The Honorable John Whittington, Justice, succeeded the Honorable Nathan Hecht, a member of the original panel, at the expiration of his term on December 31, 1988. Justice Whittington has reviewed the briefs and the record before the court.

sole point of error urges that the trial court erred in granting summary judgment. We agree and, therefore, reverse the judgment and remand the cause to the trial court for further proceedings.

FACTUAL BACKGROUND

In 1983, Robinowitz and Gibraltar entered into a partnership to purchase property in New Orleans with the expectation of development. Gibraltar agreed to finance development of the property if height zoning variances could be obtained. In 1985, after the variances were obtained, Robinowitz and Gibraltar formed two new partnerships. One of the partnerships was to own the land and the other was to develop it. The agreements provided for joint and equal management.

Robinowitz also had an agreement entitling him to be the developer and manager of the development and another agreement with the contractor to share in construction revenues. The development was to be in several phases and would include office space, retail space, a multi-screen theatre, an athletic club, a parking garage and a hotel. The estimated cost was $500 million and the development was to be called the Galleria. The development began preleasing office space and Embassy Suites began negotiations for franchising the hotel. Because of a waning New Orleans economy and increased rental competition there was a severe capital shortage. Gibraltar Agreed to supply the extra

capital but required Robinowitz to decrease his share in the hotel to 25%.

Gibraltar withheld final approval of the construction of the hotel and athletic club which caused construction and leasing delays. Robinowitz urged Gibraltar to close the hotel negotiations so that construction could begin. During this period, Robinowitz sent several letters to different Gibraltar employees threatening litigation and/or asking Gibraltar to continue construction, maintain time schedules, pay expenses, etc.

In September 1986, Robinowitz was scheduled to meet with the board of directors for Gibraltar in order to make a presentation concerning the hotel. Prior to the meeting, Robinowitz and his

attorney met with Herb Young, a Gibraltar officer, and Cory Patick, Gibraltar's representative to the Galleria partnership. During this meeting, Young stated that Gibraltar was going to cut off financing for the Galleria, would not fund the hotel and would sell what existed of the Galleria for whatever it would bring. After further conversations between the attorneys for both parties, Robinowitz's legal counsel was convinced of Gibraltar's determination to close the Galleria and sell what was available.

Shortly thereafter, Robinowitz began negotiations with Gibraltar's attorney in an effort to sell his interest. During the negotiations, construction continued as scheduled. When the settlement talks stopped, Gibraltar instructed the

contractor to stop work. Finally, on November 6, 1986, Robinowitz signed a contract by which he sold his interest in the Galleria for $3,500,000 and agreed to release Gibraltar from each, every and all claims and/or causes of action which he may have had prior to the signing of the contract.

Two days later, Gibraltar met with construction personnel to start work that had previously been shut down. Further, on November 10, Gibraltar held a press conference and publicly stated that it had no intention of selling the project. Thereafter, Robinowitz filed suit against Gibraltar, claiming breach of fiduciary duty, fraud and misrepresentation. Gibraltar moved for summary judgment based upon the execution of the release

by Robinowitz. It is from that judgment that Robinowitz now appeals.

STANDARD OF REVIEW

A defendant who moves for summary judgment has the burden of showing as a matter of law that no material issue of fact exists as to the plaintiff's cause of action. See Arnold v. National County Mutual Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987). This may be accomplished by defendant's summary judgment evidence showing that at least one element of plaintiff's cause of action has been established conclusively against the plaintiff. See Gray v. Bertrand, 723 S.W.2d 957, 958 (Tex. 1987). A summary judgment for the defendant disposing of the entire case is proper only if, as a

matter of law, plaintiff could not succeed upon any theories pleaded. Delgado v. Burns, 656 S.@.2d 428, 429 (Tex. 1983).

The standards for reviewing a motion for summary judgment are:

> 1. The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.
>
> 2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.

> 3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548-49 (Tex. 1985); Montgomery v. Kennedy, 669 S.W.2d 309, 310-11 (Tex. 1984); Wilcox v. St. Mary's University of San Antonio, 531 S.W.2d 589, 592-93 (Tex. 1975). See also City of Houston v. Clear Creek Basin Authority, 589 S.W.2d 671 (Tex. 1979).

The crucial issue raised by this appeal is whether under the facts of this case, the release contained in the contract of sale precluded Robinowitz from affirming the contract and suing for damages on the contract. If so, the granting of summary judgment was proper.

We conclude that under the facts presented the release did not bar Robinowitz's cause of action.

RELEASE AND FRAUD IN THE INDUCEMENT

A settlement agreement or release which is valid on its face and has not been set aside is a complete bar to a later action on the matters contained with the release. Leluca v. Munzel, 673 S.W.2d 373, 375 (Tex. App. -- Houston [1st Dist.] 1984, writ ref'd n.r.e.); Tobbon v. State Farm Mut. Auto Ins. Co., 616 S.W.2d 243, 245 (Tex. Civ. App. -- San Antonio 1981, writ ref'd n.r.e.). See First Texas Sav. Ass'n v. Dicker Center, Inc., 631 S.W.2d 179, 186 (Tex. App. -- Tyler 1982, no writ). Robinowitz

executed a release which stated that he fully released Gibraltar from

> ....each, every and all claims and/or causes of action which [he] may have in connection with any dealings, transactions, agreements or understanding with Gibraltar which have occurred prior to the date of this mutual release....It is mutually agreed that no party to this release shall file suit against any released party in connection with agreements or occurrences taking place prior to the date of this mutual release....

The record reflects that during the negotiations between Robinowitz and Gibraltar as well as at the time of the execution of the release Robinowitz was represented by legal counsel. Robinowitz's attorney informed Robinowitz that if he signed the release and covenant not to sue that he would be precluded from

litigating any claims arising out of his dealings with Gibraltar prior to executing the release. Robinowitz's deposition testimony reflects that he understood this.

Robinowitz claims, however, that he may sue because he had two sets of claims: 1) the prior released causes of action and 2) those arising from the sale of his Galleria interests. Robinowitz asserts that when a party is fraudulently induced to enter into a contract he may retain what was received and, waiving the fraud, sue on the contract for damages. "Fraud in the inducement is fatal to a contract. One induced by fraud may stand to the bargain and recover damages for fraud or he may rescind." Polar Bear Ice Cream Company, Inc. v. Arnold, 620 S.W.2d

191, 193 (Tex. Civ. App. -- Waco 1981, writ dism'd w.o.j.). Robinowitz asserts that he can sue for the difference between the contract price and the itemized value of his contracts because he was fraudulently induced into signing the release and covenant not to sue.

Robinowitz alleges that the fraud is due to the representations made by Gibraltar and its attorneys that it was going to withdraw from the Galleria project, when in fact it had no intention of doing so. According to Robinowitz's allegations, further fraud was committed by the orchestrated attempts of Gibraltar to cease construction, cut off credit, and renege on promises, agreements and commitments, which were aimed at exerting economic pressure intense enough to drive

Robinowitz from the partnership. It is uncontroverted that Gibraltar represented it wanted to close the Galleria project and sell what it could; however, Patick, Gibraltar's representative, stated that

> There was never an intent to sell. There was an intent to complete the entire building and in the lease-up phase. There was no need to sell, no desire to sell, and furthermore, there was no attempt on the part of Gibraltar basically to sell it at that time.

Partners are obligated to deal honestly and fairly with each other in the operation and conduct of their business. Mutual good faith is required of all parties enjoying partnership status. The actions of a partner must be judged not by the morals of the

marketplace, but by the punctilio of an honor the most sensitive. This, then, is the standard of behavior required of a partner. As to this there has developed a tradition that is unbending and inveterate. Smith v. Bowlin, 153 Tex. 486, 271 S.W.2d 93, 96 (1954). Accordingly, Texas law requires that each partner make full disclosure to other partners of all material facts which are known to him. Johnson v. Buck, 540 S.W.2d 393, 399 (Tex. Civ. App. -- Corpus Christi 1976, writ ref'd n.r.e.). The summary judgment proof leaves unresolved issues of fact as to whether Gibraltar made material misrepresentations which were fraudulent and in violation of its fiduciary duty. Thus, on the grounds of fraud and breach of fiduciary duty,

Gibraltar failed to meet its burden of establishing its entitlement to summary judgment as a matter of law.

RATIFICATION

Gibraltar also raised the affirmative defense of ratification. A defendant may prevail on his motion for summary judgment if he expressly presents and conclusively proves all essential elements of that defense as a matter of law. Montgomery v. Kennedy, 669 S.W.2d 309, 310-11 (Tex. 1984). "In order to establish waiver or ratification, the proof must show that the defrauded party had knowledge of the material facts concerning the fraud at the time of making a new contract...." Bodovsky v. Texoma Nat'l. Bank of Sherman, 584 S.W.2d

838, 873 (Tex. Civ. App. -- Dallas 1979, writ ref'd n.r.e.). The crucial element in determining ratification is the ratifying party's full knowledge of the fraud at the time of ratification.

We hold that there was a fact issue as to whether Robinowitz knew that Gibraltar had no intention of stopping the Galleria project and selling it. The summary judgment evidence strongly demonstrates that Robinowitz was aware of Gibraltar's dealings prior to the September meeting in Los angeles. However, the summary judgment evidence reflects that Gibraltar represented to Robinowitz, his partners and his attorney that it was closing down the Galleria project and selling it for what it could obtain. In his deposition testimony

Robinowitz states that because he was told there would not be a food court, hotel, athletic club, movie theater, etc., he felt the project would be ruined if the Galleria were not completed. Consequently, he wanted out of the deal in order to salvage what he could. There is a fact issue as to whether Robinowitz was operating under a fraud he knew nothing about at the time of the execution of the release. Robinowitz could not release a cause of action he knew nothing about. We hold, therefore, that a fact issue was raised which made

summary judgment improper. Accordingly, we reverse and remand.

LINDA THOMAS
JUSTICE

DO NOT PUBLISH
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No. 94-682

In the Supreme Court of the United States

OCTOBER TERM, 1994

DANIEL P. ROBINOWITZ, PETITIONER

v.

RESOLUTION TRUST CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESOLUTION TRUST CORPORATION IN OPPOSITION

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1994

QUESTION PRESENTED

Whether the court of appeals correctly applied the *D'Oench, Duhme* doctrine and 12 U.S.C. 1823(e) to bar fraudulent inducement claims based on alleged oral misrepresentations purportedly made in the course of the settlement of lender liability claims.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-36) is reported at 23 F.3d 951. The order of the district court (Pet. App. 37-39) is unreported. A related opinion of the Texas Court of Appeals for the Fifth District (Pet. App. 43-62) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1994. A petition for rehearing was denied on September 19, 1994. Pet. App. 40-42. The petition for a writ of certiorari was filed on September 26, 1994. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner approached Gibraltar Savings (Gibraltar), a state-chartered federally insured savings association,[1] in 1983 to obtain financing for a proposed multi-phase development in Metaire, Louisiana, later known as the Galleria. Pet. App. 9. Gibraltar loaned petitioner $9,000,000 to acquire the underlying real estate. *Id.* at 34-35. In 1985, petitioner and Gibraltar formed two joint ventures, between entities controlled by petitioner, on the one hand, and FGIC Investment Corporation (FGIC) (a second-tier subsidiary of Gibraltar), on the other, to develop the first phase of the project. *Id.* at 10. Petitioner contends that he retained primary responsibility for development and management of the project, *ibid.*, and that Gibraltar had primary responsibility for financing the first phase, *ibid.* Gibraltar funded approximately $100 million in loans on the project. *Id.* at 34.

In 1986, disputes developed between petitioner and Gibraltar. Petitioner threatened suit against Gibraltar, contending that Gibraltar was reneging on its commitment to provide $26 million needed to finance a hotel, which he claimed was to have been developed in the first phase of the project, and that Gibraltar had intentionally delayed other financing for the project. Pet. App. 11; Pet. 8-9. Gibraltar, for its part, became increasingly concerned about its financial commitment to the project in the face of a softening real estate market. Pet. App. 11.

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[1] For simplicity, Gibraltar and financial institutions generally will be referred to hereinafter as "banks."

In the summer of 1986, the parties entered into discussions to resolve their disputes. Pet. App. 11. As a result of those discussions, petitioner and his entities agreed to convey their interests in the project, and to terminate their relationship with Gibraltar and its subsidiaries, in exchange for $3.5 million, relief from all liabilities in connection with the project, and a mutual release of claims and liabilities arising from the parties' joint venture agreements. *Id.* at 12-13. That accord was embodied in a written Settlement and Mutual Release Agreement (Settlement Agreement) executed by petitioner and by Gibraltar, FGIC, and First Gibraltar Mortgage Corporation (Shawmut) (FGIC's parent, which was itself a wholly owned mortgage-banking subsidiary of Gibraltar).[2] *Id.* at 13.

Shortly after the settlement, petitioner filed suit in Texas state court against Gibraltar, FGIC, and Shawmut, alleging breach of fiduciary duty, fraud, and misrepresentation. Plaintiff's First Amended Original Petition (Pl.'s Pet.) 1-2, 7-8.[3] Petitioner claimed that

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[2] Later in 1986, Gibraltar sold the stock of First Gibraltar Mortgage Corporation to Shawmut Bank, N.A., at which time it was renamed Shawmut First Mortgage Corporation. Gibraltar retained the stock of FGIC. R. 5:1202. As part of its sale of Shawmut, Gibraltar indemnified Shawmut and its new owner for certain liabilities, including losses relating to the Galleria joint ventures. R. 3:548. Shawmut was subsequently sold to El Paso Savings Association, which converted to a federally chartered savings and loan association and, in September, 1991, was placed into Resolution Trust Corporation receivership. R. 6:1336-6:1337; Pet. App. 9 n.1.

[3] Petitioner filed suit, in addition, against Gibraltar Financial of California, a holding company that owned all of Gibraltar's stock. Gibraltar Financial settled and was dismissed as a defendant in February, 1993. Pet. App. 14 n.2.

Gibraltar and FGIC told him at the time of the settlement that Gibraltar was not going to continue to fund the hotel—that it was going to stop all further development and sell the Galleria project for whatever it could get—while Gibraltar and its subsidiaries intended all the while to get "[petitioner] out of the deal so that they could have it for themselves." Pet. 9-11; Pet. App. 15. Petitioner claimed that his interest in the Galleria project was worth at least $13.5 million, but that he was pressured by Gibraltar's misrepresentations into selling out for only $3.5 million. Pl.'s Pet. 5-7.[4]

The trial court granted summary judgment against petitioner, ruling that petitioner's claims were foreclosed by the Settlement Agreement. Pet. App. 15. The Texas court of appeals reversed and remanded, however, finding that an issue of fact existed as to "whether Gibraltar made material misrepresentations which were fraudulent and in violation of its fiduciary duty," and thus "whether [petitioner] was operating under a fraud he knew nothing about at the time of the execution of the release." *Id.* at 58, 61.

2. On October 30, 1989, the Resolution Trust Corporation (RTC) was appointed receiver for Gibraltar, and intervened in the state court action, removing it to federal court. Pet. App. 16. The United States District Court for the Northern District of Texas granted summary judgment in favor of the RTC, Shawmut and FGIC, holding that because the alleged oral misrepresentations about the intentions of Gibraltar and FGIC with respect to the project did not appear in the Settlement Agreement, petitioner's claims were barred

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[4] In fact, Gibraltar never developed any future phases of the Galleria, and it lost more than $54 million when it sold the project 15 months after the settlement. Dean Harrison Aff. (R. 3:533) 5.

by the *D'Oench, Duhme* doctrine[5] and its statutory counterpart, 12 U.S.C. 1823(e) (1988 & Supp. V 1993). Pet. App. 16.[6]

3. The court of appeals affirmed. Pet. App. 2-36.

a. The court held that Fifth Circuit precedent, *Bowen* v. *FDIC*, 915 F.2d 1013, 1015 (1990), foreclosed any argument that *D'Oench, Duhme* and Section 1823(e) apply only to claims that are related to a note or debt. Pet. App. 19-21.

b. The court rejected petitioner's argument that his claims for breach of fiduciary duty are not barred by

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[5] See *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942).

[6] Section 1823(e) provides:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

Pursuant to 12 U.S.C. 1441a(b)(4) (Supp. V 1993), the protection afforded the Federal Deposit Insurance Corporation (FDIC) under Section 1823(e) extends equally to the RTC.

D'Oench, Duhme. Pet. App. 22-26. In the court's view, the core of petitioner's claim is that he was induced by alleged misrepresentations to sign the Settlement Agreement. *Id.* at 23-24. Finding that claim indistinguishable from the claim rejected in *Langley* v. *FDIC*, 484 U.S. 86 (1987), the court held it similarly barred. Pet. App. 24-25.

c. The court held that *D'Oench, Duhme* also bars petitioner's claims against FGIC and Shawmut, on the ground that federal regulators "must be able to examine the records of the subsidiary, as well as the parent, especially since the subsidiary may constitute a major asset of the parent." Pet. App. 28.

d. The court held that *Langley* v. *FDIC* foreclosed petitioner's argument that because bank examiners knew of his suit at least two years before the RTC took over Gibraltar, *D'Oench, Duhme* does not apply. Pet. App. 29-32.

e. The court rejected petitioner's contention that the transactions at issue in this case were outside the traditional banking function and therefore outside the purview of *D'Oench, Duhme.* Pet. App. 32-35. Distinguishing this case from *Alexandria Assocs.* v. *Mitchell Co.*, 2 F.3d 598 (5th Cir. 1993), which involved allegations of fraud in connection with a bank subsidiary's sale of partnership interests in a real estate development venture, the court stressed that here "[Gibraltar's] primary relationship with [petitioner] was as a lender." Pet. App. 34. The court found that, in providing $100 million in project financing, "Gibraltar was performing a quintessential banking function," and that in entering into the Mutual Release and Settlement Agreement "[respondents] here sought to settle disputes over their financing of a project, not to make an ordinary commercial investment." *Id.* at 35.

ARGUMENT

1. Petitioner argues that the district court erred in applying *D'Oench, Duhme* and 12 U.S.C. 1823(e) to bar "free-standing" tort claims for fraud and breach of fiduciary duty. Pet. 14-27. Petitioner's claims are not "free-standing," however, but are tied inextricably to an agreement entered into by Gibraltar in the course of an ordinary banking transaction.

The Settlement Agreement was designed in part to resolve liability claims arising from, among other things, Gibraltar's alleged failure to fund a multi-million dollar loan. Petitioner's tort claims are tied intimately to the Settlement Agreement. The core of petitioner's claims is that the Settlement Agreement was subject to oral representations. *D'Oench, Duhme* and Section 1823(e), however, require that any such terms be in writing and be properly recorded in the books and records of the financial institution if they are to be enforceable against the FDIC or RTC. See, *e.g.*, *FDIC* v. *Longley I Realty Trust*, 988 F.2d 270, 274 (1st Cir. 1993) (Section 1823(e) precludes appellants from binding FDIC to alleged settlement); *FDIC* v. *Hadid*, 947 F.2d 1153, 1157 (4th Cir. 1991) (applying *D'Oench, Duhme* to bar claims related to oral agreement allegedly made in course of loan restructuring).

There are two primary purposes behind *D'Oench, Duhme* and Section 1823(e): (1) to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets; and (2) to ensure mature consideration of unusual loan transactions by senior bank officials and prevent the fraudulent insertion of new terms when a bank appears headed for failure. See *Langley* v. *FDIC*, 484 U.S. at 91-92. Both purposes are served by the application of *D'Oench, Duhme* and Section

1823(e) in this case. Federal and state examiners had to rely on the books and records of Gibraltar and its subsidiaries in examining and evaluating the worth of Gibraltar, and in deciding whether to liquidate Gibraltar or to finance a sale of its assets. Petitioner's claims, if successful, would significantly diminish the value of Gibraltar's assets (*e.g.*, the stock of FGIC and Gibraltar's rights in the Settlement Agreement) on the basis of alleged representations that were never documented or reflected in the institution's books or records. Moreover, if petitioner had insisted at the time that the alleged oral misrepresentations be included in the written Settlement Agreement, that would have facilitated consideration by Gibraltar's senior management of the wisdom of including such representations as conditions to the effectiveness of the Agreement.

This case falls squarely within the scope of the *D'Oench, Duhme* bar. Despite his current protestations, petitioner was not a hapless victim. If he was indeed relying on alleged oral representations, he could have protected himself by insisting that those representations be documented as conditions to the Settlement Agreement. Instead, he accepted the financial benefits of the settlement without requiring that the alleged basis for his willingness to accept the "low" settlement offer be reflected as part of the Agreement.[7] Because petitioner thereby lent himself to a transaction that might mislead the banking authorities, he is properly barred from asserting against the

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[7] Because petitioner had the ability to protect his interests by insisting on a formal writing, he is not, as he claims to be (Pet. 26), in a position akin to a negligence victim. His position as a tort creditor is no different from that of the claimants who were denied recovery in *Langley* v. *FDIC*, *supra*.

RTC the alleged oral terms of the settlement transaction. See *D'Oench, Duhme*, 315 U.S. at 460.[8]

Contrary to petitioner's assertion, Pet. 15-18, the court's holding in this case does not conflict with the application of *D'Oench, Duhme* by any other court of appeals. Although petitioner claims that four circuits do not apply *D'Oench, Duhme* to "free-standing" tort claims, Pet. App. 15 & n.6 (citing cases from the Sixth, Eighth, Eleventh, and District of Columbia Circuits), each of those circuits applies the doctrine to preclude claims—like petitioner's—that are based on unwritten agreements relating to regular banking transactions.

The opinion in *Vernon* v. *FDIC*, 981 F.2d 1230 (11th Cir. 1993), states broadly that *D'Oench, Duhme* does not bar "free-standing tort claims that are not related to a specific asset acquired by the FDIC," *id.* at 1233-1234, but that case held only that *D'Oench, Duhme* does not bar a suit alleging fraud by a bank in the sale of its own securities. The Eleventh Circuit has since emphasized the limited nature of the holding in *Vernon*, and has made clear that the broad language of that case should not be extended "to exempt from the *D'Oench* doctrine claims which relate directly to regular banking transactions and which should be reflected in the records of regular banking transactions." *OPS Shopping Ctr., Inc.* v. *FDIC*, 992 F.2d 306, 310-311 (1993). Most recently, the Eleventh Circuit held that "the key inquiry is one of relatedness. This requirement demands that a tort be

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[8] Petitioner's denial of borrower status (Pet. 24) is disingenuous. Petitioner considered himself or his entities to be the developer and the Gibraltar companies to be the financing source. Pl.'s Pet. 4. Gibraltar loaned approximately $100 million on the Galleria project and paid petitioner a substantial sum of cash to settle his lender liability claims.

sufficiently intertwined with regular banking transactions, such that exclusion of the alleged 'secret agreement' accords with the underlying policies of *D'Oench*." *In re Geri Zahn, Inc.*, 25 F.3d 1539, 1543 (1994).[9]

Similarly, although *Astrup* v. *Midwest Fed. Sav. Bank*, 886 F.2d 1057 (8th Cir. 1989), contained broad language seemingly precluding the extension of *D'Oench, Duhme* to tort claims, *id.* at 1059, the Eighth Circuit has since described *Astrup* as holding merely that *D'Oench, Duhme* does not affect tort claims that are not based upon an agreement. *Hanson* v. *FDIC*, 13 F.3d 1247, 1252 (1994). The court made clear that "actions sounding in tort but based upon unwritten or secret agreements between the parties are barred." *Ibid.*[10] See also *Oliver* v. *RTC*, 955 F.2d 583, 585-586 (8th Cir. 1992) (*D'Oench, Duhme* precludes claims of breach of fiduciary duty based on unrecorded side agreements).

Nor has the District of Columbia Circuit announced any "free-standing" tort exception, as suggested by petitioner. In *E.I. du Pont de Nemours & Co.* v. *FDIC*, 32 F.3d 592 (D.C. Cir. 1994), the court adopted the standard set forth in *In re Geri Zahn, Inc.*, *supra*, that

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[9] *Jones* v. *RTC*, 7 F.3d 1006 (11th Cir. 1993), which petitioner cites as supportive of his "free-standing" tort exception, was vacated when the court of appeals granted rehearing en banc. See *RTC* v. *Dunmar Corp.*, 20 F.3d 397 (11th Cir. 1994).

[10] The court in *Hanson* cited favorably to *Timberland Design, Inc.* v. *First Serv. Bank for Sav.*, 932 F.2d 46, 50 n.4 (1st Cir. 1991), *Hanson*, 13 F.3d at 1252, which expressly criticized the language in *Astrup*, concluding that "[t]o the extent that *Astrup* supports the contention that *D'Oench* does not bar affirmative claims sounding in tort, we reject it as contrary to *D'Oench*'s policy of shielding the FDIC from secret agreements." *Timberland*, 932 F.2d at 50 n.4.

D'Oench, Duhme bars those tort claims that are "sufficiently intertwined with regular banking transactions, such that exclusion of the alleged 'secret agreement' accords with the underlying policies of [the doctrine]." 32 F.3d at 600.

Finally, contrary to petitioner's understanding, the Sixth Circuit has not ruled on the application of *D'Oench, Duhme* in the present context. In *Commerce Fed. Sav. Bank* v. *FDIC*, 872 F.2d 1240 (6th Cir. 1989), the court held that the deed of trust on which the FDIC had based its suit (and with respect to which the debtor asserted an oral modification) was not an acquired asset of the FDIC because the debtor had satisfied all indebtedness secured by the deed of trust before the FDIC was appointed receiver. *Id.* at 1245. *D'Oench, Duhme* was held inapplicable because the "invalidity" of the subject asset (the deed of trust) was caused by its satisfaction prior to its acquisition by the FDIC. *Ibid.*[11]

2. Petitioner argues (Pet. 27-30) that the court of appeals erred in applying *D'Oench, Duhme* to bar his

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[11] Petitioner argues (Pet. 31-35), in addition, that the court of appeals' determination that his claims arose from regular banking transactions conflicts with *Alexandria Assocs.* v. *Mitchell Co.*, 2 F.3d 598 (5th Cir. 1993). The existence of an intra-circuit conflict would not provide a basis for this Court's review. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974). In any event, the panel in this case correctly distinguished *Alexandria Assocs.* The claims in that case arose from alleged misrepresentations by a bank subsidiary in the course of its commercial sale of partnership interests in real estate development ventures. 2 F.3d at 603. Although the bank's subsidiaries had financed the acquiror's purchase, the alleged misrepresentations were viewed as relating to the sale, not the loan. Here, in contrast, petitioner's claims arose directly from the settlement of lender liability claims asserted by petitioner against Gibraltar, and the termination of their lender/borrower relationship.

claims against Shawmut, on grounds that Shawmut was a non-banking subsidiary and that it was sold by Gibraltar two years before Gibraltar failed. The common law *D'Oench, Duhme* doctrine logically extends to petitioner's claims against Shawmut, however, and the Fifth Circuit's application of the doctrine in this case was fully consistent with its application by the other courts of appeals.

a. The policies underlying *D'Oench, Duhme* argue strongly for its application to petitioner's claims against Shawmut. Contrary to petitioner's contention, Pet. 29, although Shawmut was not itself federally insured, it was expressly subject to bank examiners' scrutiny. As the court of appeals recognized, banking authorities "must be able to examine the records of the subsidiary, as well as the parent, especially since the subsidiary may constitute a major asset of the parent." Pet. App. 28. Shawmut was, as Gibraltar's subsidiary, required by federal regulations to "establish and maintain such accounting and other records as [would] provide an accurate and complete record of all business transacted by it," and to make such records available for examination and audit. 12 C.F.R. 563.17-1(c), 563.17-2 (1986). Because the representations alleged by petitioner were not written or recorded in Shawmut's books and records, however, they could not be detected on such review.

In *Langley* v. *FDIC*, *supra*, this Court recognized that "[t]he harm to the FDIC caused by the failure to record occurs no later than the time at which it conducts its first bank examination that is unable to detect the unrecorded agreement and to prompt the invocation of available protective measures, including termination of the bank's deposit insurance." 484 U.S. at 95. In this case, because petitioner failed to insist upon written documentation of the alleged misrepresentations, bank

examiners could have found no record in Shawmut's books and records (or anywhere else) to support petitioner's claims and could not, therefore, have considered the potential financial impact of those claims on the financial well-being of Shawmut or Gibraltar.

b. Because Gibraltar retained a contractual duty to indemnify Shawmut for claims related to the Galleria project, the RTC, as receiver, is the real party in interest with respect to petitioner's claims against Shawmut. *D'Oench, Duhme* therefore applies to the claims against Shawmut in the same manner as it applies to the claims made directly against the RTC. See *Pernie Bailey Drilling Co.* v. *FDIC*, 905 F.2d 78, 80 (5th Cir. 1990) (FDIC, though not a named party, was proper party to remove the case because of its indemnification obligation); *Hall* v. *FDIC*, 920 F.2d 334, 339-340 (6th Cir. 1990), cert. denied, 501 U.S. 1231 (1991) (dismissal of claims appropriate because FSLIC was real party in interest).

Petitioner's failure to insist that the alleged misrepresentations be documented in the Settlement Agreement deprived the bank examiners of their ability to determine accurately Gibraltar's potential liability under the indemnification agreement. *D'Oench, Duhme* must therefore be applied to bar petitioner's claims against Shawmut; otherwise, petitioner will have achieved indirectly what he cannot obtain directly—recovery against the RTC for claims based on alleged oral misrepresentations made in the course of a regular banking transaction. The failure to apply *D'Oench, Duhme* in this context would, in addition, permit fraud against the federal receiver through the transfer by a bank of a subsidiary that is subject to claims based on oral understandings. Cf. *Langley* v. *FDIC*, 484 U.S. at

92 (*D'Oench, Duhme* serves to prevent fraudulent insertion of terms when bank appears headed for failure).

c. As the court of appeals noted, Pet. App. 27, the other courts of appeals that have addressed the issue have all similarly concluded that *D'Oench, Duhme* bars claims against wholly owned subsidiaries of failed institutions when those claims are based on secret or oral agreements. See *Sweeney* v. *RTC*, 16 F.3d 1, 4 (1st Cir.), cert. denied, 115 S. Ct. 291 (1994); *Oliver* v. *RTC*, 955 F.2d at 585-586; *Victor Hotel Corp.* v. *FCA Mortgage Corp.*, 928 F.2d 1077, 1083 (11th Cir. 1991).

3. Finally, petitioner argues (Pet. 35-40) that *D'Oench, Duhme* and Section 1823(e) should not bar his claims because, at the time Gibraltar was placed into receivership, the books and records of Gibraltar disclosed the existence of his suit. That argument is foreclosed by *Langley* v. *FDIC*, *supra*, which held that the FDIC's knowledge of alleged misrepresentations before the failure of a bank is irrelevant to the application of Section 1823(e) to bar claims made after the failure against the FDIC as receiver. 484 U.S. at 94.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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